

REMARKS/ARGUMENTS

The Office Action dated February 18, 2010 has been carefully reviewed. Reconsideration of the objections and rejections contained therein is respectfully requested in view of the following remarks. Claims 1-49 and 51 are pending in the application. Claims 1, 10, 11, 15, 22, 30, 34, 39 and 42 are independent claims. Claim 51 is added by this Amendment.

Allowable Subject Matter

Applicants note with appreciation the indication on page 15 of the 8/21/2009 Office Action that claims 10, 14, 18-21, 29, 33, 36-39 and 49 are either allowable or would be allowable if rewritten into independent form. In view of the remarks below, an indication of allowance for each of claims 1-49 and 51 is respectfully requested.

Reply to Examiner's Response to Arguments

Since the Examiner has maintained the prior rejections and has provided arguments in support of this position, Applicants will address the Examiner's response first.

1. Applicants have already filed a declaration relating to inventorship of the claimed subject matter.

As will be explained below, Applicants filed a declaration for this application listing Kenneth M. Gainey and James A. Proctor Jr. as the inventors on 4/12/2005. At this point, another declaration is redundant. Kenneth M. Gainey and James A. Proctor Jr. are the inventors of the subject matter pending in this application.

Regarding the reference U.S. Publication No. 2004/0157551, Kenneth M. Gainey and James A. Proctor Jr. are listed as co-inventors along with a number of other inventors. However, the filing date of U.S. Publication No. 2004/0157551 (6/20/2003) is after the earliest filing date of the subject application based on Provisional Application No. 60/418,288 (10/15/2002). Thus, it is Applicants' understanding that as applied U.S. Publication No. 2004/0157551 is not prior art as the Examiner is relying on the priority claim to Provisional Application No. 60/390,094. The consideration as to whether the Provisional Application No. 60/390,094 (6/21/2002) is prior art under 35 U.S.C. § 102(e) based on its inventorship is a separate consideration from the inventorship listed on U.S. Publication No. 2004/0157551.

Inventorship between provisional applications and non-provisional applications does not need to be the same. For example, an inventor listed on a non-provisional application need only contribute to one claim to be listed as a co-inventor, and Non-Provisional Applications can include subject matter that was never disclosed in the provisional application.

The Patent Cover Sheet filed on 6/21/2002 for Provisional Application No. 60/390,094 lists only Kenneth M. Gainey and James A. Proctor Jr. as inventors. Thus, Applicants submit that the record is clear that the inventive entity of Provisional Application No. 60/390,094 is the same as the subject application, such that Provisional Application No. 60/390,094 is not “by another”.

Again, Applicants believe the Examiner's suggested declaration is not required because the inventors of the subject application already filed the 4/12/2005 declaration and to the extent that the claimed subject matter is disclosed in Provisional Application No. 60/390,094, as it is not “by another” as the inventive entity is the same. Should the Examiner, persist with his request of the a separate declaration, Applicants respectfully request that the Examiner specify the subject matter that is alleged to have disputed inventorship and whether it is based on Provisional Application No. 60/390,094 or solely on U.S. Publication No. 2004/0157551.

2. Double Patenting Rejection.

Claims 22 and 42 were rejected under the judicially created doctrine of obviousness-type double patenting as allegedly being obvious over claims 1-36 of co-pending Application No. 10/516,327. Applicants respectfully request that this rejection be held in abeyance until all other substantive issues in this case have been resolved. At that time, the Applicants will immediately provide a copy of a terminal disclaimer to the Examiner to overcome this rejection, if needed. The filing of a terminal disclaimer or offer to file a terminal disclaimer in this case does not constitute an admission of the propriety of the obviousness-type double patenting rejection. See MPEP § 804.02 and Quad Environmental Technologies Corp. v. Union Sanitary District, 946 F.2d 870, 20 USPQ2d 1392 (Fed. Cir. 1991).

SUMMARY

Since the Examiner has maintained his rejection of claims 1-9, 11-13, 15-17, 22-28, 30-32, 34, 35 and 40-48 under 35 U.S.C. §102(e) as noted above, Applicants once again traverse these rejections. Applicants expressly maintain the reasons from the prior responses to clearly indicate on the record that Applicants have not conceded any of the previous positions relative to the maintained rejections. For brevity, Applicants expressly incorporate the prior arguments presented in the 11/23/2009 response without a literal rendition of those arguments in this response.

For at least the foregoing reasons and the reasons set forth in Applicants' response of 11/23/2009, it is respectfully submitted that claims 1, 10, 11, 15, 22, 30, 34, 39 and 42 are distinguishable over the applied art. The remaining dependent claims are allowable at least by virtue of their dependency on the above-identified independent claims. See MPEP § 2143.01. Moreover, these claims recite additional subject matter, which is not suggested by the documents taken either alone or in combination.

CONCLUSION

It is believed that all of the pending claims have been addressed in this paper. However, failure to address a specific rejection, issue, or comment, does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above are not intended to be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment.

In light of the amendments contained herein, Applicants submit that the application is in condition for allowance, for which early action is requested. Should any issues remain unresolved, the Examiner is encouraged to telephone the undersigned at the number provided below.

Please charge any fees or overpayments that may be due with this response to Deposit Account No. 17-0026. If a fee is required for an extension of time under 37 CFR 1.136 not accounted for above, such an extension is requested and the fee should also be charged to our Deposit Account.

Respectfully submitted,

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